

# Bid to City Of San José

for

## Fuel Cell System

Name of Bidder: \_\_\_\_\_

The representations herein are made under penalty of perjury.

To: The City of San Jose, State of California

The undersigned, as bidder, declares that the only person or parties interested in this proposal as principals are those named herein; that this proposal is made without collusion with any other person, firm or corporation; that the bidder has thoroughly read and examined and has full knowledge of and understands all the provisions and contents of this proposal and the documents which must be attached hereto, the Plans approved by the Director of Environmental Services Department on **April 17 2007**, entitled **Fuel Cell System**, and the Specifications approved by the Director of Environmental Services Department on **April 17 2007**, entitled **Fuel Cell System** on file in the office of the Director of Environmental Services Department of the City of San Jose in City Hall, San Jose, California; that the bidder has thoroughly examined said Plans and Specifications which are on file in the office of the Director of Environmental Services Department, and that the bidder has full knowledge of and understands said Plans and Specifications and the requirements thereof; and that the bidder has further read and understands, and has knowledge of the contents of any and all addenda to said Plans and Specifications on file; and that the bidder proposes and agrees, if this proposal is accepted, that the bidder will contract with the City of San Jose, in the form of the copy of the contract on file in the office of the Director of Environmental Services Department, to do all the work and furnish all materials specified or referred to in the contract, in the manner and time therein prescribed, and according to the requirements of the City or Director of Environmental Services Department as therein set forth, to furnish the contract, bonds and insurance specified in the Specifications, and to do all other things required of the Design-Build Contractor by the contract; and will take in full payment therefore the following price or unit prices as shown in the Schedule of Quantities on the next page(s).

If the bidder or other interested persons is a corporation, state legal name of corporation, also names of the President, Secretary, Treasurer, and the Manager thereof; if a partnership, state the name of the partnership, if one exists, also the names of all the partners comprising the partnership; if any of the partners are individuals, state the first and last name of every individual in full, if any of the partners are corporations, state for each such corporation, the information required above of corporations; if any of the partners are partnerships, state for each such partnership the information required above of partners; if the bidder or other interested person is a joint-venture, state the name of the joint venture, also names of all joint venturers comprising the joint venture; if any of the joint venturers are individuals, state the first and last name of every individual comprising the joint venture; if any of the joint venturers are corporations, state for each corporation the information required above of corporations; if any of the joint venturers are partnerships, state for each such partnership, the information required above of partners; if bidder or other interested persons is an individual, state first and

last names in full.

If bidder is an individual, the bidder's signature shall be placed below; if bidder is an individual, doing business under a fictitious name, the name of the individual followed by the words "doing business under (insert the fictitious name)" shall be set forth above, together with the signature of the individual; if bidder is a corporation, the legal name of the corporation shall be set forth above, together with the signature of the officer or officers of the corporation, authorized to sign contracts on behalf of the corporation, the corporate title; that is Vice-President, Secretary, etc., should be placed below the name of the officer and the corporate seal affixed; if bidder is a partnership, the legal name of the partnership, if one exists, shall be set forth above, together with the signature of the partner or partners authorize to sign contracts on behalf of the partnership; if any of the partners are corporations, execution for such partners shall be accomplished in accordance with the requirements set forth above for corporations; if any of the partners are partnerships, execution for such partners shall be accomplished in accordance with the requirements set forth above for partnership; if bidder is a joint-venture, the legal name of the joint venture, if one exists, shall be set forth above for partnerships. If signature is by an agent other than an officer of a corporation, or member of a partnership or a joint venture, a Power of Attorney must be on file with the City Clerk prior to opening bids or submitted with the bid; otherwise, the bid may, at the City's option, be disregarded as non-responsive.

If this proposal shall be accepted and the undersigned shall fail to contract, and to give the Contractor's Bonds For Faithful Performance and the Contractor's Payment Bond required by the specifications and contract and by law, and to provide all insurance as required by said contract, within eight (8) days after the bidder has received notice from the City of San Jose, the City may, at its option, determine that the bidder has abandoned his/her contract, and thereupon this proposal and the acceptance thereof shall be null and void, and the forfeiture of such security accompanying this proposal shall operate and the same shall be the property of the City of San Jose.

In accordance with Public Contract Code Section 10232, the Design-Build Contractor, hereby states under penalty of perjury, that no more than one final unappealable finding on contempt of court by a federal court has been issued against the Design-Build Contractor within the immediately preceding two year period because of the Design-Build Contractor's failure to comply with an order of a federal court which orders the Design-Build Contractor to comply with an order of the National Labor Relations Board. Signing this Proposal on the signature portion thereof shall constitute signature of this Statement.

Accompanying this proposal are the following documents completely filled in by the bidder and the same are incorporated herein by reference;

1. Cash, a cashier's check or a certified check made payable to City, or a bidder's bond executed by an admitted surety insurer naming the City as beneficiary, in an amount equal to \$30,000.
2. A list of design subconsultants for work over one half of one percent of the design contract, if any, the address of each subconsultant and the description of work to be done by each subconsultant

3. A list of subcontractors for work over one half of one percent of the construction contract, if any, the address of each subcontractor and the description of work to be done by each subcontractor.
4. A statement of financial responsibility, technical ability, and experience if such information is not already on file with the City.
5. Safety Record
  - A. Copy of completed OSHA Form 300A, "Summary of Work-Related Injuries and Illnesses" for most recent calendar year.
  - B. Copy of communication from contractor's workers' compensation insurance carrier indicating the contractor's "Experience Modifier" (or "ex. Mod")

City may at its option, request additional supplemental information after bid opening.

Bidder understands that the City reserves the right to reject any or all bids and to waive any informalities in the bidding.

**The undersigned, as bidder, declares that in listing subcontractors in this bid, I have not discriminated or given any preference to any firm based on race, sex, color, age, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity, or national origin. I understand that any such discrimination or preference is in violation of Chapter 4.08 of the Municipal Code.**

**Execution of the Non-Collusion Affidavit constitutes execution of this Bid Proposal including the above statement of nondiscrimination and, with the exception of the Bidder's Bond or Addenda, if any, no other signatures will be required.**

# Schedule of Quantities

for

San Jose/Santa Clara Water Pollution Control Plant

## Fuel Cell System

Base Bid Items for Fuel Cell System with (4) 300kW Modules					
Item	Base Bid Item Description	Unit	Estimated Quantity	Unit Price	Extended Price (In Figures)
1	Design of Fuel Cell System (Section A-1000)	Lump Sum	1		
2	Construction of Fuel Cell System (Section A-1000) (Sum of Items 2A and 2B)	Lump Sum	1		
2A	Price of Fuel Cell System (Section A-1000)	Lump Sum	1		
2B	Price for Installation and Commissioning of Fuel Cell System (Section A-1000)	Lump Sum	1		
3	Service and Maintenance of the Fuel Cell System (Replacement/Restacking not included)	kW-Hours	52,560,000		
4	Replacement/Restacking of Fuel Cell System	Lump Sum	1		

Total Base Bid Amount in Figures (Items 1, 2, 3, and 4)

Total Base Bid Amount in Words (Items 1, 2, 3, and 4)

Deductive Bid Items for (1) 300kW Module					
Item	Deductive Bid Item Description	Unit	Estimated Quantity	Unit Price	Extended Price (In Figures)
A	Price of (1) 300kW Module, including installation and commissioning	Lump Sum	1		
B	Service and Maintenance of (1) 300kW Module (Replacement/Restacking not included)	kW-Hours	13,140,000		
C	Replacement/Restacking of (1) 300kW Module	Lump Sum	1		

Deductive Bid Item for Performance Bond for Fuel Cell System Service Agreement (Items 3 and 4)					
Item	Deductive Bid Item Description	Unit	Estimated Quantity	Unit Price	Extended Price (In Figures)
D	Contractor's Bond For Faithful Performance for Fuel Cell System Service Agreement (Items 3 and 4)	Lump Sum	1		

**Basis of Bid Evaluation:** Bidder shall submit a Total Base Bid on a lump sum basis as set forth in the Schedule of Quantities. The bid shall include all State, Federal, and other taxes applicable to the project and shall be firm offer for a period of 90 days after bid opening. All bid items, including lump sums and unit prices, must be filled in completely for Base Bid Items and Deductive Bid Items. In the evaluation of Bids, the lowest bid shall be the lowest responsive Base Bid (Items 1, 2, 3, and 4). Once the low bidder has been identified, the City may elect to award Items 1, 2, and 3 or deduct Items A, B, and/or D from the Bid, even if the resulting contract amount is not the lowest price.

As stated in the Service Agreement, the City shall have the option to order the replacement/restacking of the Fuel Cell System (Item 4) during the term of the Service Agreement. If the City elects to deduct Items A and B, then the price of Item 4 shall be reduced by the price of Item C.

Bidder:

Company

Signature

# Noncollusion Affidavit

Project Title: **Fuel Cell System**

\_\_\_\_\_, being first duly sworn,  
(print name)

deposes and says that he/she is the party making the foregoing bid that the bid is not made in the interest of, or on behalf of, any undisclosed person, partnership, company, association, organization, or corporation; that the bid is genuine and not collusive or sham; that the bidder has not directly or indirectly induced or solicited any other bidder to put in a false or sham bid, and has not directly or indirectly colluded, conspired, connived, or agreed with any bidder or anyone else to put in a sham bid, or that anyone shall refrain from bidding; that the bidder has not in any manner, directly or indirectly, sought by agreement, communication or conference with anyone to fix the bid price of the bidder or any other bidder, or to fix any overhead, profit, or cost element of the bid price, or of that of any other bidder, or to secure any advantage against the public body awarding the contract of anyone interested in the proposed contract; that all statements contained in the bid are true; and further, that the bidder has not, directly or indirectly, submitted his or her bid price or any breakdown thereof, or the contents thereof, or divulged information or data relative thereto, or paid, and will not pay, any fee to any corporation, partnership, company, association, organization, bid depository, or to any member or agent thereof the effectuate a collusive or sham bid.

In accordance with Title 23, United States Code, Section 112, the bidder hereby states, under penalty of perjury, that he/she has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with this contract. Bidders are cautioned that making a false certification may subject certifier to criminal prosecution.

**The undersigned declares under penalty of perjury that the information contained in this proposal and all accompanying documents are true and correct.**

Executed on \_\_\_\_\_

\_\_\_\_\_  
Legal Company Name

\_\_\_\_\_  
Indicate Type of Entity: Sole Proprietorship, Partnership (General/Limited Partners), Corporation, Joint Venture, etc.

By: \_\_\_\_\_ Title: \_\_\_\_\_

City Business Lic. No.: \_\_\_\_\_

Expiration Date: \_\_\_\_\_

State Contractor Lic. No.: \_\_\_\_\_

Classification: \_\_\_\_\_

Expiration Date: \_\_\_\_\_

Federal ID No.: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

\*\*\*\*\*

**Notary**

On \_\_\_\_\_ before me, \_\_\_\_\_ , personally  
(Name and title of officer)

Appeared \_\_\_\_\_ , personally known to me  
(or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s)  
is/are subscribed to the within instrument and acknowledged to me that he/she/they executed  
the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the  
instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the  
instrument.

WITNESS my hand and official seal, subscribed and sworn to before me.

Signature \_\_\_\_\_  
Notary Public

(Seal)

# BIDDER'S BOND

KNOW ALL PERSONS BY THESE PRESENTS:

That we, \_\_\_\_\_ as PRINCIPAL,  
and \_\_\_\_\_, a corporation duly organized

under the laws of the State of \_\_\_\_\_ and duly licensed to become sole surety on bonds required or authorized by the State of California, as SURETY, are held and firmly bound unto the City of San Jose (hereinafter called the "City"), in the penal sum of THIRTY THOUSAND DOLLARS (\$30,000), submitted by said Principal to the City of San Jose, for the work described below; for the payment of which sum in lawful money of the United States, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents. In no case shall the liability

of the Surety hereunder exceed the sum of \_\_\_\_\_  
\_\_\_\_\_ DOLLARS (\$ \_\_\_\_\_).

THE CONDITION OF THIS OBLIGATION IS SUCH,

That whereas the Principal has submitted the above mentioned bid to the City of San Jose, for certain construction specifically described as follows, for which bids are to be submitted in the Office of the City Clerk, Wing 2nd Floor, New City Hall, San Jose, California on **June 7, 2007** for **Fuel Cell System**.

NOW, THEREFORE, if the aforesaid Principal is awarded the contract and, within the time and manner required under the specifications, after the prescribed forms are presented to Principal for signature, enters into a written contract, in the prescribed forms, in accordance with the bid, and files a Faithful Performance Bond and a Contractor's Payment Bond, and files the required insurance policies with the City, all as required by the specifications and the contract or by law, then the obligation shall be null and void; otherwise it shall be and remain in full force and effect.

The Surety, for value received, hereby stipulates and agrees that the obligation of said Surety and its bond shall be in no way impaired or affected by any extension of the time within which the Owner may accept such Bid; and said Surety does hereby waive notice of any such extension.

In the event suit is brought upon this bond by the Obligee and judgement is recovered, the Surety shall pay all costs incurred by the Obligee in such suit, including a reasonable attorney's fee to be fixed by the court.



IN WITNESS WHEREOF, we have hereunto set our hands and seals on this \_\_\_\_\_  
\_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_.

PRINCIPAL

SURETY

\_\_\_\_\_  
Legal Company Name

\_\_\_\_\_  
Legal Company Name

\_\_\_\_\_  
Indicate Type of Entity

By: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Title: \_\_\_\_\_

(Affix Corporate Seals)

(Attach Acknowledgments of both Principal and Surety signatures)

# Schedule of Quantities

for

San Jose/Santa Clara Water Pollution Control Plant

## Fuel Cell System

Item	Bid Item Description	Unit	Estimated Quantity	Unit Price	Extended Price (In Figures)
1	Design of Fuel Cell System (Section A-1000)	Lump Sum	1		
2	Construction of Fuel Cell System (Section A-1000) (Sum of Items 2A and 2B)	Lump Sum	1		
2A	Price of Fuel Cell System (Section A-1000)	Lump Sum	1		
2B	Price for Installation and Commissioning of Fuel Cell System (Section A-1000)	Lump Sum	1		

Total Award Amount in Figures (Items 1 and 2) \_\_\_\_\_

**FUEL CELL SERVICE AGREEMENT  
BETWEEN  
THE CITY OF SAN JOSÉ  
AND**

This Agreement is entered into as of \_\_\_\_\_ between the City of San José, a municipal corporation ("City"), and \_\_\_\_\_, a \_\_\_\_\_ ("Contractor").

***RECITALS***

1. On \_\_\_\_\_ the San José City Council awarded a contract to design and build a Fuel Cell System at the San Jose/Santa Clara Water Pollution Control Plant ("Fuel Cell System Project"), as described in the plans and specifications entitled ""Fuel Cell System" and dated \_\_\_\_\_ ("Design-Build Contract"); and
2. Contractor has been awarded the contract for the work described herein by the City Council of the City of San José on \_\_\_\_\_, related to service and maintenance of the Fuel Cell System; and
3. Service Provider has the necessary expertise and skill to perform such services;

***NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS:***

**1 AGREEMENT DOCUMENTS**

The documents forming the entire Agreement between City and Contractor shall consist of this Agreement including:

- Exhibit A - Definitions
- Exhibit B - Scope of Services and Schedule of Performance
- Exhibit C - Compensation
- Exhibit D - Insurance Requirements
- Exhibit E - Labor Compliance Addendum

The definitions contained in the attached Exhibit A shall apply to this Agreement. In the event any discrepancies or inconsistencies between the provisions of this Agreement and any of the above-referenced documents arise, the provisions of this Agreement will prevail.

This Agreement and the Exhibits set forth above, contain all of the agreements, representations and understandings of the parties hereto, and supersede and replace any previous understandings, commitments, or agreements, whether oral or written.

## **2 SCOPE OF SERVICES AND SCHEUDLE OF PERFORMANCE**

Services shall be provided by Contractor in accordance with the attached Exhibit B, entitled "Scope of Services and Schedule of Performance".

## **3 TERM OF AGREEMENT**

The term of this Agreement shall commence upon acceptance of the Fuel Cell System as set forth in the Design-Build Contract and shall continue for an uninterrupted term of five (5) years, subject to the provisions of Section 8.

## **4 SCHEDULE OF PERFORMANCE**

Contractor's services must be completed according to the schedule set out in the attached Exhibit B, entitled "Scope of Services and Schedule of Performance." Time is of the essence in this Agreement.

## **5 COMPENSATION**

City shall pay Contractor an amount not to exceed \$        to Contractor for Basic Services as described in the attached Exhibit B, entitled "Scope of Services and Schedule of Performance." City shall pay Contractor an additional amount not to exceed \$        to Contractor if City exercises the option to require Additional Services as specified in Exhibit B. The terms rate and schedule of payment are set forth in the attached Exhibit C, entitled "Compensation."

## **6 TAXES AND CHARGES**

Contractor shall be responsible for payment of all taxes, fees contributions or charges applicable to the conduct of Contractor's business or to the performance of this Agreement, including but not limited to all taxes, duties, fees, or other charges of any nature (including ad valorem, consumption, excise, franchise, gross receipts, property, import, license, stamp, storage, transfer, use, sales, or value-added taxes and any and all items of withholding, deficiency, penalty, addition to tax, interest or assessment related thereto.

## **7 LABOR COMPLIANCE**

This Agreement is subject to City's Prevailing/Living Wage Policy and the applicable implementing regulations (collectively, the "Policy"). Contractor shall comply with the provisions of the attached Labor Compliance Addendum (Exhibit E), which sets forth Contractor's obligations under the Policy.

## **8 TERMINATION**

### ***8.1 Termination for Convenience***

City shall have the right to terminate this Agreement, without cause, by giving not less than thirty (30) days written notice of termination.

### ***8.2 Termination for Default***

If Contractor fails to perform any of its material obligations under this Agreement, in

addition to all other remedies provided by law, City may terminate this Agreement immediately upon written notice.

### **8.3 Termination Authority**

The Director of Environmental Services ("Director") is empowered to terminate this Agreement on behalf of City.

### **8.4 Consequences of Termination**

In the event of termination, Contractor shall deliver to City, copies of all reports, documents, and other work performed by Contractor under this Agreement, and upon receipt thereof, City shall pay Contractor for services performed and reimbursable expenses incurred to the date of termination.

## **9 INDEMNIFICATION**

Contractor shall defend, indemnify and hold harmless City, its officers, employees and agents against any claim, loss or liability arising out of or resulting in any way from work performed under this Agreement due to the willful or negligent acts (active or passive) or omissions by Contractor's officers, employees or agents. The acceptance of said services and duties by City shall not operate as a waiver of such right of indemnification.

## **10 INSURANCE REQUIREMENTS**

Contractor agrees to have and maintain the policies set forth in Exhibit D, entitled "Insurance Requirements," which is attached hereto and incorporated herein. All policies, endorsements, certificates, and/or binders shall be subject to approval by the Risk Manager of the City of San José as to form and content. These requirements are subject to amendment or waiver if so approved in writing by the Risk Manager. Contractor agrees to provide City with a copy of said policies, certificates and/or endorsements before work commences under this Agreement.

## **11 WAIVER**

Contractor agrees that City's waiver of any breach or violation of any provision of this Agreement shall not be deemed to be a waiver of any other provision or a waiver of any subsequent breach or violation of the same or any other provision. City's acceptance of the performance of any of Contractor's services will not be a waiver of any provision of this Agreement.

## **12 INDEPENDENT CONTRACTOR**

Contractor, in the performance of this Agreement, is an independent Contractor. Contractor shall maintain complete control over all of Contractor's employees, any subcontracting subcontractors, and Contractor's operations. Neither Contractor nor any person retained by Contractor may represent, act, or purport to act as the agent, representative or employee of City. Neither Contractor nor City is granted any right or authority to assume or create any obligation on behalf of the other.

### **13 COMPLIANCE WITH LAWS**

Contractor shall comply with all applicable laws, ordinances, codes and regulations (collectively, "laws") of the federal, state and local governments, including without limitation, any and all laws specified elsewhere in this Agreement.

### **14 CONFLICT OF INTEREST**

Contractor shall avoid all conflict of interest or the appearance of conflict of interest in performance of this Agreement.

### **15 NONDISCRIMINATION**

Contractor agrees that there shall be no discrimination against, or segregation of, any person, on account of race, sex, color, age, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity, national origin, marital status, or family status, in connection with or related to the performance of this Agreement.

### **16 GIFTS**

#### ***16.1 Prohibition on Gifts***

Contractor acknowledges that Chapter 12.08 of the San José Municipal Code prohibits City's officers and designated employees from accepting gifts as defined in Chapter 12.08.

#### ***16.2 No Offer***

Contractor agrees not to offer any City officer or designated employee any gift prohibited by Chapter 12.08.

#### ***16.3 Breach of Agreement***

Contractor's offer or giving of any gift prohibited by Chapter 12.08 will constitute a material breach of this Agreement. In addition to any other remedies, City may have in law or equity, City may terminate this Agreement for such breach as provided in Section 8 of this Agreement.

### **17 DISQUALIFICATION OF FORMER EMPLOYEES**

Contractor is familiar with Chapter 12.10 of the San José Municipal Code ("Revolving Door Ordinance") relating to the disqualification of City's former officers and employees in matters which are connected with their former duties or official responsibilities. Contractor shall not utilize either directly or indirectly any officer, employee, or agent of Contractor to perform services under this Agreement, if in the performance of such services, the officer, employee, or agent would be in violation of the Revolving Door Ordinance.

### **18 CONFIDENTIAL INFORMATION**

All data, documents, discussions or other information developed or received by or for Contractor in performance of this Agreement are confidential and must not be disclosed to any person except as authorized by City, or as required by law.

## **19 OWNERSHIP OF MATERIALS**

All reports, documents or other materials developed or discovered by Contractor or any other person engaged, directly or indirectly, by Contractor to perform Contractor's services are City's property without restriction or limitation upon their use.

## **20 CONTRACTOR'S BOOKS AND RECORDS**

### ***20.1 Maintenance during Term***

Contractor shall maintain any and all ledgers, books of account, invoices, vouchers, canceled checks, and other documents evidencing or relating to charges for services, or expenditures and disbursements charged to City for a minimum period of three (3) years, or for any longer period required by law, from the date of final payment to Contractor pursuant to this Agreement.

### ***20.2 Maintenance after Term***

Contractor shall maintain all documents which demonstrate performance under this Agreement for a minimum period of three (3) years, or for any longer period required by law, from the date of termination or completion of this Agreement.

### ***20.3 Inspection***

Any documents required to be maintained pursuant to this Agreement must be made available for inspection or audit, at any time during regular business hours, upon written request by the City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Contractor shall provide copies of such documents to City for inspection at City Hall when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records shall be available at Contractor's address indicated for receipt of notices in this Agreement.

### ***20.4 Custody of Records***

Where City has reason to believe that any of Contractor's documents relating to this Agreement may be lost or discarded due to dissolution, disbandment or termination of Contractor's business, City may, by written request by any of the above-named officers, require that custody of the Contractor's documents be given to City and that these documents be maintained in City Hall. City agrees to grant access to Contractor's documents to any party authorized by Contractor, Contractor's representatives, or Contractor's successor-in-interest.

## **21 ASSIGNABILITY**

The parties agree that the expertise and experience of Contractor are material considerations for this Agreement. Unless specifically authorized by this Agreement, Contractor may not assign the performance of any obligation or interest under this Agreement without the prior written consent of City. Any attempt by Contractor to assign this Agreement, in violation of this Section, will be voidable at City's sole option.

## **22 SUBCONTRACTORS**

Except as provided in Section 22.1, Contractor may not use subcontractors to perform any services authorized under this Agreement.

### **22.1 Authorized Subcontractors**

Notwithstanding Section 21 (Assignability) above, Contractor may use the manufacturer of the Fuel Cell System to perform services under this Agreement, and may use such other subcontractors as may be approved in advance by City to performing Contractor's services hereunder. Contractor must obtain City's prior written consent in order to use, change or add any subcontractor. Contractor shall be responsible for directing the work of any approved subcontractor and for any compensation due to subcontractors. City assumes no responsibility whatsoever to subcontractors, including but not limited to responsibility for compensation.

### **22.2 Compliance with Agreement**

Contractor shall ensure that all Contractor's subcontractors comply with this Agreement. At City's request, Contractor shall require any or all of Contractor's subcontractors to sign an agreement with Contractor requiring compliance with this Agreement.

## **23 GOVERNING LAW**

This Agreement must be construed, and its performance enforced, under California law.

## **24 VENUE**

In the event that suit is brought by either party to this Agreement, the parties agree that venue must be exclusively vested in the state courts of the County of Santa Clara, or where otherwise appropriate, exclusively in the United States District Court, Northern District of California, San José, California.

Contractor further agrees that in the event a lawsuit involving this Agreement is filed by City, Contractor will unconditionally accept the jurisdiction of a federal or state court located in Santa Clara County, California.

## **25 NOTICES**

All notices and other communications required or permitted to be given under this Agreement must be in writing and must be personally served, or mailed, postage prepaid via U. S. mail, or sent via courier service, addressed to the respective parties as follows:

To City:                      Director of Environmental Services  
                                    City of San Jose  
                                    200 East Santa Clara St., 10<sup>th</sup> floor  
                                    San José, CA 95113

To Contractor:

Notice will be effective on the date personally delivered, or if sent by courier service, on the date of receipt. If mailed, notice will be effective three (3) days after deposit in the mail.



The parties may change their respective addresses in accordance with the provisions of this Section.

## **26 MISCELLANEOUS**

### **26.1 *Survival of Provisions***

If any part of this Agreement is for any reason found to be unenforceable, all other parts nevertheless remain enforceable.

### **26.2 *Assignment***

Subject to the provisions of Section 21 (Assignability), this Agreement binds and inures to the benefit of the parties and their respective successors and assigns.

### **26.3 *Headings***

The headings of the sections and exhibits of this Agreement are inserted for convenience only. They do not constitute part of this Agreement and are not to be used in its construction.

### **26.4 *Authority of City Manager***

Where this Agreement requires or permits City to act and no officer of the City is specified, City's Manager or the designated representative of City's Manager has the authority to act on City's behalf.

APPROVED AS TO FORM:

"CITY"  
City of San José  
a municipal corporation

\_\_\_\_\_  
Senior Deputy City Attorney

By \_\_\_\_\_  
Name:  
Title:  
Date: \_\_\_\_\_, 2007

"CONTRACTOR"

'  
A

By \_\_\_\_\_  
Name:  
Title:  
Date: \_\_\_\_\_, 2007

## **EXHIBIT A DEFINITIONS**

The following terms shall have the meaning set forth below:

1. "Acceptance" means the successful completion of the Fuel Cell System Project, including projects acceptance and PG&E verification as described in the Design-Build contract.
2. "Consumables" shall mean the water treatment salts, catalysts, adsorbents, purge gases, specialty gases, filters, gaskets, o-rings, fasteners and washers which are specified in the Contractor's maintenance manual and necessary for the Power Plant to perform its functions. Specifically excluded from the definition of "Consumables" are Utilities.
3. "FCS Power Plant(s)" or "Plant(s)" A carbonate-based fuel cell power plant as described in the Design-Build Contract.
4. "Excluded Service" shall mean any activity regarding the Power Plant or component thereof, which may be required due to: (i) any Force Majeure event; (ii) breach of contract, negligence, willful misconduct or otherwise of City or City's agents, Contractors, employees or persons acting on behalf of City, their agents, or Contractors; (iii) act or omission of any third party other than third party suppliers or materials or equipment for the FCS Power Plant; (iv) changes to any law, ordinance, regulation or order of governmental authority having jurisdiction over the Power Plant which become effective after the Effective Date of this Agreement, and require changes in the scope of maintenance or repair services.
5. "Facility" shall mean the connections, interfaces, and supporting equipment for the Plant, including the support system, slab or pedestal on which the Plant is located, fuel supply, electrical distribution system, and equipment connected to the Plant's interface points but excluding the Plant itself.
6. "Force Majeure" shall mean any event beyond the reasonable control of the party affected, including, without limitation, any act of God, act (or failures to act) of governmental authorities or public enemy, strike, work stoppage or other labor disturbance, delays in transportation, utility outage, war (declared or undeclared), epidemics, blockade, riot, public unrest, lightning, fire, violent storm, flood, unforeseeable geological condition, drought, severe weather, explosion, government order or restraint, whether of a similar or dissimilar nature, which event (i) could not have been reasonably anticipated by the affected party, and (ii) cannot be reasonably avoided or circumvented by the affected party and as to Contractor, acts (or omissions) of City including failure to promptly: (a) provide Contractor with information and approvals necessary to permit Contractor to proceed with work immediately and without interruption, (b) comply with the terms of payment, or (c) provide Contractor with such evidence as Contractor may request that any permit has been issued.

7. "Module or FCS Module" refers to that portion of the FCS Power Plant, which performs the conversion of fuel energy to electricity using a carbonate fuel cell process that is proprietary to Contractor.
8. "Power Plant Output" refers to the net electrical output of the FCS Power Plant as determined using onboard instrumentation and industry standard testing protocols with corrections to measured performance.
9. "Repair" or "Repairing" shall mean in relation to any item of the Power Plant, the repair or replacement, at Contractor's option, utilizing repair measures determined by Contractor, of a part or parts of any damage to, or malfunction or breakdown of such Power Plant.
10. "Site" means the location where the Fuel Power Plant under this Contract is to be located, which address is 700 Los Esteros Road, San Jose, California 95134.
11. "Specifications" mean the FCS Power Plant Specifications, as stated in the Design-Build Contract.
12. "Utilities" shall mean air, water, wastewater, fuel and electric power required to operate the Power Plant.

## **EXHIBIT B SCOPE OF SERVICES**

### **1. Contractor Responsibilities:**

**1.1 General Scope:** Contractor shall; (a) provide all materials, equipment and labor, including Consumables, required for maintenance and operation of the FCS Power Plant on a seven (7) day a week, twenty four hour (24) per day basis, including but not limited to (a) provision of either new or remanufactured parts, as acceptable to City, and upon replacement, Contractor, may at its option, take title to such replaced parts or components; (b) provision on all tooling necessary to perform its obligations under Agreement; (c) coordination of all operation and maintenance activities with City; and (d) allowing City's maintenance personnel to observe, Contractor's personnel as they perform operation and preventative maintenance activities and procedures. Contractor shall adhere to all manufacturer's specifications for the FCS in the performance of this Agreement or, in the absence of applicable specifications, to the generally accepted operating practices of the electric power industry. Contractor shall comply with all state, local and federal laws applicable to operation and maintenance of the FSC Power Plant, including but not limited to CAL-OSHA safety standards and all permits required to operate the FCS Power Plant.

**1.2 Preventative Maintenance:** Contractor shall be responsible for providing technical service, parts and Consumables associated with preventative maintenance as specified in the FCS Manufacturer's Maintenance Manual. Preventative Maintenance as used herein shall mean in relation to any component of the Plant, the minor inspection, major inspection, part cleaning, replacement, and performance of other scheduled maintenance with respect thereto, in order to keep the Power Plant that has been otherwise operated and maintained by Contractor pursuant to the terms of this Agreement as set forth in Contractor's Operations and Maintenance Manual(s), in good working order. Scheduled maintenance activities shall be avoided during the months of June through October and shall only be allowed upon express approval of City and closes coordination with Plant operations.

**1.3 Unplanned Maintenance:** Contractor shall be responsible for providing Repair of the FCS Power Plant in accordance with this Agreement whenever during the Term such Repair is determined by Contractor to be necessary. Contractor shall use best efforts to effect immediate and remote diagnostics upon notification to Contractor by City of a malfunction of the FCS Power Plant. Upon Contractor's determination that a malfunction of the FCS Power Plant cannot be remedied remotely, Contractor shall use best efforts to dispatch service personnel to the site within 24 hours of notification of malfunction.

**1.4 Power Plant Performance:** Contractor warrants to City that for the Term of this Agreement, the Power Plant Output, as determined using onboard instrumentation and industry standard testing protocols with corrections to measured performance, shall have at least 90% availability; 90% electrical output and 90% of its rated efficiency. Should the Plant fail to perform in accordance with any of the foregoing requirements, Contractor shall correct the failure as soon as necessary components are available.

Delay in correction shall not be excused based on unavailability of labor or tooling.

**1.5 List of personnel:** Contractor shall submit names of personnel along with their position, responsibility, hours of work and important information to City to keep track of people working on the Site. The list shall include information of the shift supervisor and back up personnel for each scheduled shift. No one will be allowed to enter the Site if they are not in the list or it is not their working hours. Contractor shall always have personnel available and will provide a telephone number that is always attended in the event of emergency. Any changes should be brought to the attention of the project manager in writing. If the project manager is not available, such as during the night shift, then the Contractor shall coordinate with the Shift Supervisor or the Computer Room Operator. Contractor shall bring up any changes immediately as they are known. The changes should not involve additional personnel that names do not appear anywhere on the list. Any additional personnel to the list should be brought to the attention of the project manager. Only the project manager may allow additional personnel.

**1.6 List of equipment:** Contractor shall submit a list of equipment that they will store on site. The list will include a description, serial number, quantity and any other information that City will need to keep track of the equipment. Any addition should be brought to the attention of the project manager, and Contractor shall submit an updated list.

**1.7 List of parts and materials:** The Contractor shall submit a list of all parts and materials stored on site. This list shall not include spare parts submitted to the City as part of the construction phase. Any additions shall be brought to the attention of the project manager and Contractor shall submit an updated list.

**1.8 Schedule:** Contractor shall submit a yearly schedule for review by the project manager. The first schedule shall be submitted at the beginning of the contract and successive schedule will be submitted ten (10) days before the end of the previous year. Any changes on the schedule will be brought to the attention of the project manager, and Contractor shall submit an updated schedule. The schedule shall include the reading of the energy meter as a basis for payment.

**1.9 Operations & Maintenance Log:** Contractor shall keep a log of operation and a log of maintenance which shall be available to City staff at anytime. At the end of the contract, a copy of the logs shall be surrendered to City.

**1.10 FCS Module Replacement:** At City option, Contractor shall replace the FCS Module with a new FCS Module of the same make and model as the FCS Module installed pursuant to the Design Build contract. If Contractor determines that the same make and model FCS Module is not longer available when City exercises the option for replacement, Contractor shall provide City with a list of other FCS Modules, if any, which would fit into the Power Plant configuration for the module to be replaced and would meet or exceed the rated Power Plant Output of the module to be replaced.

## **2. City's Responsibilities:**

2.1 *General Scope:* City shall (a) provide one analog phone line and high-speed access link to the Power Plant for remote monitoring; (b) supply access to the Power Plant and the Facility and shall make available at the Site, office space, phones, fax machines, water, air conditioning, sanitary facilities, potable water, site security, and safety equipment for Contractor's on-site personnel; (c) maintain all the permits, including emissions and licenses necessary to operate the Facility and the Power Plant; (d) provide space for the storage spare parts on site; (e) provide Utilities for the operation of the FCS Power Plant; (f) provide onsite storage of replaced Consumables, including waste, but Contractor will arrange and pay for the removal and proper disposal of replaced Consumables and other wastes; and (g) provide Contractor with biannual water and fuel analyses. City may, but shall not be obligated to, provide City staff to assist in operation of the FCS power plant; it is expressly understood that the purpose for providing such assistance shall be to provide additional training to City staff in operation of the FCS Power Plant. Failure of the City to provide such staff assistance shall not operate to reduce or relieve Contractor's obligation to provide operations and maintenance services.

2.2 *Option for Stack Replacement:* City shall provide written notice to Contractor no less than 270 calendar days prior to the expiration of the term of this Agreement should City elect to exercise the option to require Contractor to replace the FCS Module. Should Contractor notify City that it has determined that the same make and model FCS Module is not longer available and shall provide City with a list of other FCS Modules, City may elect to require Contractor to replace the FCS Module with any Module so listed; should Contractor fail to identify any alternative FCS Modules, City shall have the option to direct the replacement with any FCS Module which would fit into the Power Plant configuration for the module to be replaced and would meet or exceed the rated Power Plant Output of the module to be replaced. Should City exercise the option for replacement of the FCS Module, the price for such replacement, including all labor, materials and supplies required for such replacement shall be \$\_\_\_\_\_ [price stated in bid]. Such price shall apply to replacement with the

## **3. Exclusions**

3.1 This Agreement does not cover Repairs to the Power Plant required due to Excluded Services, unless otherwise agreed by Contractor on a case-by-case basis. Such Repairs and Consumables, materials and labor required due to Excluded Services, shall be at City's expense.

3.2 Nothing contained in is this Agreement shall supersede repairs covered under Manufacturer's warranty; provided however, that any repairs which manufacturer claims are excluded from warranty for whatever reason, shall be provided hereunder.

3.3 This Agreement does not cover Repairs to the Power Plant if City or its vendors, suppliers, employees or agents makes any changes, modifications or

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alterations to the Power Plant or its components without the written approval of Contractor.

## **EXHIBIT C COMPENSATION**

### **1. Amount of Compensation**

Payment for services provided under this Agreement, except for FCS Module Replacement shall be based on the kW-hours supplied by the FCS. The dollar amount shall be kW-hours multiplied by the rate of operation and maintenance [item 3 in the bid schedule of quantities].

- A. At the beginning of the contract (after Notice to Proceed is issued), the City and the Contractor shall read the energy meter and will use this reading as a starting point for the beginning of the contract.
- B. The reading of the energy meter shall be done on a monthly basis and shall be read along with City staff.

The maximum amount of compensation to be paid to Contractor, including both payment for professional services and reimbursable expenses, shall not exceed        Dollars (\$) [876,000 Kwh x Contractor's Bid price] per month, and        Dollars (\$) [52,560,000 x Contractor's Bid Price] total over the term of this Agreement. Any energy produced by the FCS for which payment would result in a total exceeding the maximum amount of compensation set forth herein shall be at no cost to City.

If City exercises the option for FCS Fuel Cell Replacement, compensation for such replacement shall be [item 4 in the schedule of quantities].

### **2. Invoices**

Contractor shall submit to City a monthly invoice within fifteen (15) working days of the last day of each month, in arrears, for payment for services performed pursuant to this Agreement. The monthly invoice shall include a statement of work performed during the month. City shall review the monthly invoice submitted by Contractor and within ten (10) working days of receipt of the invoice, City shall notify Contractor of any discrepancies or deficiencies in said invoice.

If City exercises the option for FCS Fuel Cell Replacement, Contractor shall submit one invoice within fifteen (15) days after City's acceptance of Fuel Cell Module Replacement. City's acceptance shall be conditioned on verification that the replacement cell meets or exceeds all requirements stated in the Specifications for the original FCS Module.

### **3. Payment to Contractor**

Except as otherwise provided in this Agreement, City shall make monthly payments within thirty (30) business days of City's approval of Contractor's invoice. If City makes any payments or incurs any costs for which City is entitled to reimbursement from any payment otherwise due to Contractor from City, City may deduct such reimbursement from any payment otherwise due to Contractor from City. City shall submit to Contractor written documentation in support of such deduction upon Contractor's request. In the event City



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does not deduct such reimbursement from Contractor's payment but submits to Contractor an invoice for reimbursement, Contractor shall reimburse City within thirty (30) days of receipt of such invoice.

## **EXHIBIT D INSURANCE REQUIREMENTS**

Contractor, at Contractor's sole cost and expense, shall procure and maintain for the duration of this Agreement insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the services hereunder by Contractor, its agents, representatives, employees or subcontractors.

### **A. Minimum Scope of Insurance**

Coverage shall be at least as broad as:

1. The coverage described in Insurance Services Office Form Number GL 0002 (Ed. 1/96) covering Commercial General Liability together with Insurance Services Office Form Number GL 0404 covering Broad Form Comprehensive General Liability; or that described in Insurance Services Office Commercial General Liability coverage ("occurrence") Form Number CG 0001 Ed. 01/96; and
2. The coverage described in Insurance Services Office Form Number CA 0001 (Ed. 12/93) covering Automobile Liability, Code 1 "any auto", or Code 2 "owned autos" and Endorsement CA 0025. Coverage shall also include Code 8 "hired autos" and Code 9 "nonowned autos"; and
3. Workers' Compensation insurance as required by the California Labor Code and Employers Liability insurance; and

### **B. Minimum Limits of Insurance**

Contractor shall maintain limits no less than:

1. Commercial General Liability: \$1,000,000 combined single limit per occurrence for bodily injury, personal injury and property damage. If Commercial Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit; and
2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage; and
3. Workers' Compensation and Employers Liability: Workers' Compensation limits as required by the California Labor Code and Employers Liability limits of \$1,000,000 per accident; and

C. **Deductibles and Self-Insured Retentions**

Any deductibles or self-insured retentions must be declared to, and approved by City's Risk Manager. At the option of City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects City, its officers, employees, agents and Contractors; or Contractor shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by the City's Risk Manager.

D. **Other Insurance Provisions**

The policies are to contain, or be endorsed to contain, the following provisions:

1. Commercial General Liability and Automobile Liability Coverages

- a. Insured. The City of San Jose, its officers, employees, agents and Contractors are to be covered as additional insureds as respects: Liability arising out of activities performed by or on behalf of, Contractor; products and completed operations of Contractor; premises owned, leased or used by Contractor; and automobiles owned, leased, hired or borrowed by Contractor. The coverage shall contain no special limitations on the scope of protection afforded to City, its officers, employees, agents and Contractors.
- b. Contribution Not Required. Contractor's insurance coverage shall be primary insurance as respects City, its officers, employees, agents and Contractors. Any insurance or self-insurance maintained by City, its officers, employees, agents, or Contractors shall be excess of Contractor's insurance and shall not contribute with it.
- c. Provisions Regarding the Insured's Duties After Accident or Loss. Any failure to comply with reporting provisions of the policies by Contractor shall not affect coverage provided CITY, its officers, employees, agents, or Contractors.
- d. Coverage. Coverage shall state that Contractor's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

2. All Coverages

Each insurance policy required by this Agreement shall be endorsed to state that coverage shall not be cancelled, or reduced in limits except after thirty (30) days' prior written notice has been given to CITY's Risk Manager.

E. **Acceptability of Insurers**

Insurance is to be placed with insurers acceptable to City's Risk Manager.

F. **Verification of Coverage**

Contractor shall furnish City with certificates of insurance and with original endorsements affecting coverage required by this Agreement. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Proof of insurance shall be mailed to the following address or any subsequent address as may be directed in writing by the Risk Manager:

CITY OF SAN JOSE  
Department of Finance  
Debt & Risk Management Division  
200 East Santa Clara St  
San José, CA 95113

G. **Subcontractors**

Contractor shall include all Subcontractors as insureds under its policies or shall obtain separate certificates and endorsements for each Subcontractor.



## EXHIBIT E

### LABOR COMPLIANCE ADDENDUM

### SAN JOSÉ LIVING WAGE AND PREVAILING WAGE POLICIES

<b>AGREEMENT TITLE:</b>	<i>INSERT EITHER: "Name of Agreement" or "Service Order No. ____"</i>
<b>CONTRACTOR Name and Address:</b>	

By executing this Addendum, Contractor acknowledges and agrees that the work performed pursuant to the above referenced Agreement or Service Order is subject to all applicable provisions.

***Payment of Minimum Compensation to Employees.*** Contractor shall be obligated to pay not less than the General Prevailing Wage Rate and/or Living Wage Rate as indicated in the attached Exhibit(s) titled **Work Classification and/or Living Wage Determination**.

***A. Prevailing Wage Requirements.*** California Labor Code and/ or Resolutions of the San Jose City Council require the payment of not less than the general prevailing rate of per diem wages and rates for holiday and overtime and adherence to all labor standards and regulations. The General Prevailing Wage Rates may be adjusted throughout the term of this Agreement. Notwithstanding any other provision of this Agreement, Contractor shall not be entitled to any adjustment in compensation rates in the event there are adjustments to the General Prevailing Wage Rates.

***B. Living Wage Requirements.*** Any person employed by Contractor or subcontractor or City financial recipient or any subrecipient whose compensation is attributable to the City's financial assistance, who meets the following requirements is considered a covered employee. The employee: 1) is not a person who provides volunteer services, that are uncompensated except for reimbursement of expenses such as meals, parking or transportation; 2) spends at least half of his or her time on work for the City [4 hours a day or 20 hours a week]; 3) is at least eighteen (18) years of age; and 4) is not in training for the period of training specified under training standards approved by the City.

***C. Reports.*** Contractor shall file a completed and executed copy of this Addendum with the Department of General Services. Upon award the Department of General Services shall provide the Contractor with compliance documents to be completed and returned (with supporting documentation) to the Office of Equality Assurance. **These documents must be returned within 10 days of receipt.** Contractor shall not perform on site work on this contract until labor compliance documents are filed. Contractor shall also report additional information, including certified payrolls, as requested by Director of Equality Assurance to assure adherence to the Policy.

**D. Coexistence with Any Other Employee Rights.** These provisions shall not be construed to limit an employee's ability to bring any legal action for violation of any rights of the employee.

**E. Audit Rights.** All records or documents required to be kept pursuant to this Agreement to verify compliance with the Wage Requirement shall be made available for audit at no cost to City, at any time during regular business hours, upon written request by the City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Copies of such records or documents shall be provided to City for audit at City Hall when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records or documents shall be available at Contractor's address indicated for receipt of notices in this Contract.

**F. Enforcement.**

**1. General.** Contractor acknowledges it has read and understands that, pursuant to the terms and conditions of this Agreement, it is required to comply with the Wage Requirement and to submit certain documentation to the City establishing its compliance with such requirement. ("Documentation Provision.") Contractor further acknowledges the City has determined that the Wage Requirement promotes each of the following (collectively "Goals"):

- a. It protects City job opportunities and stimulates the City's economy by reducing the incentive to recruit and pay a substandard wage to labor from distant, cheap-labor areas.
- b. It benefits the public through the superior efficiency of well-paid employees, whereas the payment of inadequate compensation tends to negatively affect the quality of services to the City by fostering high turnover and instability in the workplace.
- c. Paying workers a wage that enables them not to live in poverty is beneficial to the health and welfare of all citizens of San Jose because it increases the ability of such workers to attain sustenance, decreases the amount of poverty and reduces the amount of taxpayer funded social services in San Jose.
- d. It increases competition by promoting a more level playing field among Contractors with regard to the wages paid to workers.

**2. Remedies for Contractor's Breach of Prevailing Wage/Living Wage Provisions.**

- a. **WITHHOLDING OF PAYMENT:** Contractor agrees that the Documentation Provision is critical to the City's ability to monitor Contractor's compliance with the Wage Requirement and to ultimately achieve the Goals. Contractor further agrees its breach of the Documentation Provision results in the need for additional enforcement action to verify compliance with the Wage Requirement. In light of the critical importance of the Documentation Provision, the City and Contractor agree that Contractor's compliance with this Provision, as well as the Wage Requirement, is an express condition of City's obligation to make each payment due to the Contractor pursuant to this Agreement. **THE CITY IS NOT OBLIGATED TO MAKE ANY PAYMENT DUE THE CONTRACTOR UNTIL CONTRACTOR HAS PERFORMED ALL OF ITS OBLIGATIONS UNDER THESE**

**PROVISIONS. THIS PROVISION MEANS THAT CITY CAN WITHHOLD ALL OR PART OF A PAYMENT TO CONTRACTOR UNTIL ALL REQUIRED DOCUMENTATION IS SUBMITTED.** Any payment by the City despite Contractor's failure to fully perform its obligations under these provisions shall not be deemed to be a waiver of any other term or condition contained in this Agreement or a waiver of the right to withhold payment for any subsequent breach of the Wage Requirement or the Documentation Provision.

- b. RESTITUTION:** Contractor agrees that in the event of a breach of its obligations it will pay any amounts underpaid in violation of the required payments and City's administrative costs and liquidated damages and, in the case of financial assistance, to refund any sums disbursed by the City.
- c. LIQUIDATED DAMAGES FOR BREACH OF WAGE PROVISION:** Contractor agrees its breach of the Wage Requirement would cause the City damage by undermining the Goals, and City's damage would not be remedied by Contractor's payment of restitution to the workers who were paid a substandard wage. Contractor further agrees that such damage would increase the greater the number of employees not paid the applicable prevailing wage and the longer the amount of time over which such wages were not paid. The City and Contractor mutually agree that making a precise determination of the amount of City's damages as a result of Contractor's breach of the Wage Requirement would be impracticable and/or extremely difficult. **THEREFORE, THE PARTIES AGREE THAT, IN THE EVENT OF SUCH A BREACH, CONTRACTOR SHALL PAY TO THE CITY, AS LIQUIDATED DAMAGES, THE SUM OF THREE (3) TIMES THE DIFFERENCE BETWEEN THE ACTUAL AMOUNT OF WAGES PAID AND THE AMOUNT OF WAGES THAT SHOULD HAVE BEEN PAID.**
- d. ADDITIONAL REMEDIES:** Contractor agrees that in addition to the remedies set forth above City retains the right to suspend or terminate the Agreement for cause and to debar Contractor or subcontractors from future City contracts and/or deem the recipient ineligible for future financial assistance.

CITY

CONTRACTOR

By \_\_\_\_\_  
Name  
Title:  
Date: \_\_\_\_\_, 2007

By \_\_\_\_\_  
Name:  
Title:  
Date: \_\_\_\_\_, 2007

# **Attachment 4**

## **Design Build Insurance Requirements**

Contractor shall procure and maintain for the duration of the contract insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the work hereunder by the Contractor, his agents, representatives, employees or subcontractors. The cost of such insurance shall be included in the Contractor's bid.

### **I. Minimum Scope of Insurance**

Coverage shall be at least as broad as:

- A. Insurance Services Office Commercial General Liability coverage "occurrence" form CG 0001 including products and completed operations, X. C. U. (explosion, collapse, underground); and
- B. Insurance Services Office form number CA 0001 covering Automobile Liability, code 1 "any auto", or code 2 "owned autos" and endorsement CA 0025. Coverage also to include code 8 "hired autos" and code 9 "non-owned" autos; and
- C. Workers' Compensation insurance as required by the Labor Code of the State of California and Employers Liability insurance; and
- D. Builders' Risk Insurance
- E. Professional Liability Errors and Omissions

### **II. Minimum Limits of Insurance**

Contractor shall maintain limits no less than:

- A. Commercial General Liability: \$5,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit; and
- B. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage; and
- C. Workers' Compensation and Employers Liability: Workers' Compensation limits as required by the Labor Code of the State of California and Employers Liability limits of \$1,000,000 per accident; and
- D. Builder's Risk: Completed value of the project. No deductible shall exceed \$50,000
- E. Professional Liability Errors and Omissions:



For Contractors or Subcontractors performing any type of design or engineering services or other professional services including but not limited to, Architect, Structural Engineer, Civil Engineer, Electrical Engineer, surveying, sampling, testing and any other professional deemed necessary activities.

Professional Liability insurance protecting against liability arising out of any negligent act, error or omission in performance of design or engineering services for the Project with per claim and aggregate limits not less than \$3,000,000. If Contractor provides design or engineering services in-house, design-build professional liability insurance or the equivalent is required. If any design or engineering services are furnished by a Subcontractor the Subcontractor shall be required to provide professional liability coverage.

Contractor agrees to maintain continuous coverage for professional liability applicable to work performed on this project for a period no less than five years after completion of the work on this project. Any claims-made policy used to meet the requirements of this agreement shall have a retroactive date prior to commencement of work on this project.

### **III. Deductibles and Self-Insured Retentions**

Any deductibles or self-insured retentions must be declared to, and approved by, the City. At the option of the City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officials, employees, agents and contractors; or the Contractor shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by the City.

### **IV. Other Insurance Provisions**

The policies are to contain, or be endorsed to contain, the following provisions:

#### **A. General Liability and Automobile Liability Coverages**

1. The City, its officials, employees, agents and contractors are to be covered as additional insureds as respects: liability arising out of activities performed by, or on behalf of, the Contractor; products and completed operations of the Contractor; premises owned, leased or used by the Contractor; or automobiles owned, leased, hired or borrowed by the Contractor. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officials, employees, agents and contractors.
2. The Contractor's insurance coverage shall be primary insurance as respects the City, its officials, employees, agents and contractors. Any insurance or self-insurance maintained by the City, its officials, employees, agents or contractors shall be excess of the contractor's insurance and shall not contribute with it.
3. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City, its officials, employees, agents, or contractors.

4. Coverage shall state that the Contractor's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

B. Builders' Risk policies shall contain the following provisions:

1. City of San Jose shall be named as loss payee.
2. The insurer shall waive all rights of subrogation against the City of San Jose

C. All Coverages

Each insurance policy required by this clause shall be endorsed to state that coverage shall not be canceled or reduced (except Builders' Risk) in coverage or in limits except after thirty (30) days' prior written notice has been given to the City.

## **V. Acceptability of Insurance**

Insurance is to be placed with insurers acceptable to the City's Risk Manager.

## **VI. Verification of Coverage**

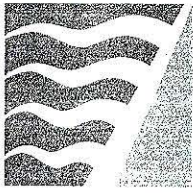
Contractor shall furnish the City with certificates of insurance and with original endorsements affecting coverage required by this clause. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Copies of all the required **Endorsements** shall be attached to the **Certificate of Insurance** which shall be provided by the Contractor's insurance company as evidence of the stipulated coverages. This proof of insurance shall then be mailed to:

City of San Jose – Finance  
Risk Management  
200 East Santa Clara Street, 4th Floor Tower  
San Jose, CA 95113-1905

## **VII. Subcontractors**

Contractors shall include all subcontractors as insureds under its policies or shall obtain separate certificates and endorsements for each subcontractor.



BAY AREA  
AIR QUALITY  
MANAGEMENT  
DISTRICT  
SINCE 1955

March 27, 2007

San Jose/Santa Clara Water Pollution Control  
700 Los Esteros Road  
San Jose, CA 95134

Attention: Kevin Maung

Application Number: 15816  
Plant Number: 778  
Equipment Location: Same as above

Dear Applicant:

We have completed our evaluation of your application for an Authority to Construct and/or Permit to Operate the following equipment:

**S-217 Fuel Cell with Fuel Pretreatment System – 95% H<sub>2</sub>S Removal,  
FuelCell Energy, Model 1500MA  
[ exempt per Regulation 2-1-128.22 ]**

We have determined that your operation is exempt from permitting per the following:

**2-1-128 Exemption, Miscellaneous Equipment:** The following equipment is exempt from the requirements of Sections 2-1-301 and 302, provided that the source does not require permitting pursuant to Section 2-1-319.

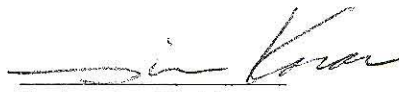
**128.22** Fuel cells that use phosphoric acid, molten carbonate, proton exchange membrane, solid oxide or equivalent technologies.

This exemption applies solely to permits. The equipment must be operated in compliance with any applicable District regulations and with other regulatory agency requirements. The District's regulations may be viewed online at [www.baaqmd.gov/regs/rulereg.htm](http://www.baaqmd.gov/regs/rulereg.htm). Note that this exemption is not permanent. Any change in your operation or in District regulations may require you to obtain permits in the future.

Please include your application number with any correspondence with the District. If you have any questions on this matter, please call Carol Lee, Senior Air Quality Engineer at (415) 749-4689.

Very truly yours,

Jack P. Broadbent  
Executive Officer/APCO

by   
Engineering Division

JK:MCL:ss

*Save the Air*